Former Judge Beverly B. Martin

Eleventh Circuit Year in Review
The Civil Docket
2021-2022

Moderator
David A. Karp
Carlton Fields P.A.

Speakers

Erwin Chemerinsky
Dean, University of California
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Earth Justice

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Elbert P. Tuttle U.S. Courthouse
Atlanta, Georgia

7 to 5

Republican appointees	Democratic appointees
William H. Pryor Jr.	Charles R. Wilson
Kevin C. Newsom	Adalberto Jordan
Elizabeth L. Branch	Robin S. Rosenbaum
Britt C. Grant	Jill A. Pryor
Robert J. Luck	(Nomination of Nancy Abudu pending)
Barbara Lagoa	
Andrew L. Brasher	

Senior Judges	Senior Judges
Gerald Bard Tjoflat	R. Lanier Anderson III
J.L. Edmondson	Frank M. Hull
Joel F. Dubina	Stanley Marcus
Susan H. Black	Julie E. Carnes
Edward Carnes	

Discussion Questions

- Trump appointed six judges — half of the 12-member active judges on the Court, including replacements for three judges appointed by Democratic presidents. How did that happen?

- Has the debate on the Court shifted from one between conservatives and progressives to one between conservative incrementalists and activists?

- Who are the judges who are most independent and most defy labels?

- President Trump named four 11th Circuit judges to his Supreme Court list. Two are under 50. Will these ambitions impact the Court?

Trump Appointees to 11th Circuit

Kevin C. Newsom, 49 (Alabama)

- replaced Bush appointee, Judge Joel Dubina
- GOP Senate refused to consider President Obama's nominee for seat, Judge Abdul Kallon
- former Alabama Solicitor General, Souter clerk
- on Trump Supreme Court short list

Elizabeth L. Branch, 54 (Georgia)

- replaced Clinton appointee, Judge Frank Hull
- former Georgia Court of Appeals Judge
- dissented in *Alabama v. NAACP*, arguing Congress did not abrogate states' immunity under Voting Rights Act

Britt C. Grant, 44 (Georgia)

- replaced Obama appointee, Judge Julie Carnes
- fmr. Georgia Supreme Court Justice, Solicitor General
- clerked for Brett Kavanaugh on D.C. Circuit
- on Trump Supreme Court short list

Robert J. Luck, 43 (Florida)

- replaced Nixon appointee, Judge Gerald Tjoflat
- former Florida Supreme Court Justice, Carnes clerk
- Known for sharp writing and questions on bench

Barbara Lagoa, 54 (Florida)

- replaced Clinton appointee, Judge Stanley Marcus
- former Florida Supreme Court Justice
- on Trump Supreme Court short list

Andrew Brasher, 40 (Alabama)

- replaced Bush appointee, Edward Carnes
- former U.S. District Judge, Alabama Solicitor General
- confirmed four months before Carnes went senior

Nancy Abudu

Biden's nominee to replace Judge Beverly Martin

- Deputy legal director, Southern Poverty Law Center
- Legal director, ACLU of Florida
- Staff attorney, ACLU Voting Rights Project
- Staff attorney, U.S. Court of Appeals for Eleventh Circuit
- First-generation Ghanaian-American lawyer. 48 years old

Discussion Questions

- Will Abudu get confirmed?

- African-Americans make up about 22 percent of the 11th Circuit's population, but there have only been two African-Americans out of 40 judges (5 percent) in the Court's history. Why have minorities been so unrepresented on the Court?

- Abudu would be the first African-American woman, the third African-American, and the only public interest lawyer on the Court. How might she influence it?

- Judge Martin wrote many dissents, sometimes to the annoyance of her colleagues. What will her retirement mean for the Court?

- Abudu will likely be on the far progressive end of the Court. Does she have any ability to move the center of the Court or influence significant decisions?

Adams v. School Board of St. Johns County
3 F.4th 1299
(vacated pending en banc review)
July 14, 2021

Panel Holding — The St. Johns County School Board violated the Equal Protection Clause of the Fourteenth Amendment by requiring Drew Adams, a transgender student, to use the girls bathrooms because he identified himself as female when he first enrolled in school even though he presented current government documents identifying himself as male.

Judge Beverly Martin wrote the initial panel opinion and a second, narrower panel opinion, both joined by Judge Jill Pryor. **Chief Judge William Pryor** dissented from both opinions.

The full Court granted rehearing en banc and heard oral arguments in February.

Overview

Drew Adams was born in 2000, and based on his physical biology, doctors designated him as a female. But throughout his young life, Adams did not feel that he was a girl. He suffered anxiety and depression, and sought treatment from a therapist and psychiatrist. In eighth grade, he told his parents that he was transgender and identified as a boy.

Mental health professionals agreed that Adams was transgender and suffered from gender dysphoria resulting from "incongruence between an individual's gender identity and birth-assigned sex." He began the process to transition to living as a boy. He cut his long hair, dressed in masculine clothing, wore a chest binder to flatten his breasts, referred to himself as "he" and "him," and used the men's restroom in public as part of "a statement to everyone around me that I am a boy." Adams also began medical treatment to end his menstrual cycle and masculinize his body through testosterones. He also underwent gender-affirming surgery.

When Adams first enrolled in fourth grade in the St. Johns County public schools, he listed his sex as female. By ninth grade, when he entered Nease High School, he had changed his birth certificate and driver's permit and license to reflect that he was a male.

For six months in ninth grade, he used the boy's bathroom, which all have private stalls, without any issue. Then, two anonymous girls complained. The school received no other complaints. No boys reported any problems about Adams' (or any student's) use of the bathroom. Nevertheless, the School District told Adams he could either use the girl's bathroom or a single-stall bathroom in the school office.

The school said it was enforcing an unwritten policy requiring boys to use the boys' bathroom and girls to use the girls' bathroom. It identified a student's gender based solely on how they self-identified when they initially enrolled in the St. Johns County public schools, not on other legal documents.

After trying to negotiate a resolution, Adams and his mother sued in 2017, alleging the School Board's bathroom policy violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.

U.S. District Judge Timothy Corrigan, appointed to the bench by President George W. Bush, held a three-day bench trial, which included a tour of the school and its bathrooms. At the end of the trial, Judge Corrigan ruled in Adams' favor on both counts, awarding him injunctive relief and damages.

The First Panel Opinion

On appeal, a three-judge panel of the Eleventh Circuit affirmed the district court on all counts.

Judge Beverly Martin wrote that the Court should apply heightened scrutiny to Adams' constitutional claim because the School Board's bathroom policy singled out transgender student for differential treatment from other students who identified either as boys or girls based on their sex assigned at birth. "The policy places a special

burden on transgender students because their gender identity does not match their sex assigned at birth," Judge Martin wrote. "And . . . discrimination against a transgender individual because of [his or] her gender non-conformity is sex discrimination."

Judge Martin identified three constitutional defects in the School Board's policy:

First, Judge Martin wrote that the School Board had administered the policy arbitrarily by looking only to enrollment forms for a student's self-identification and not accepting updated legal documents. A transgender student who enrolled for the first time in high school and self-identified by gender identity would be treated differently from Adams, who enrolled in elementary school before he began transitioning to a male.

Second, Judge Martin wrote that the School Board policy did not advance the school's legitimate privacy concerns about segregating bathrooms by gender. The trial record showed no evidence of any disruptions or privacy concerns from Adams or any transgender student using a bathroom. The Nease High School bathrooms all contained private stalls, removing any concern that a student would be exposed to another student's anatomical parts.

Third, Judge Martin wrote that the School Board policy relied on sex-based stereotypes and overbroad generalizations about transgender students.

Judge Martin also upheld the district court's ruling on Adams' claim under Title IX, which mandates that no person "shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity" receiving federal funds. 20 U.S.C. § 1681(a).

The panel found that the School Board policy constituted discrimination based on sex. It relied, in part on the Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that Title VII's prohibition on sex discrimination covered discrimination based on transgender status.

Chief Judge William Pryor wrote a blistering dissent. "Not long ago, a suit challenging the lawfulness of separating bathrooms on the basis of sex would have been unthinkable. This practice has long been the common-sense example of an acceptable classification on the basis of sex. And for good reason: it protects well-established privacy interests in using the bathroom away from the opposite sex."

"And yet the majority rules this policy illegal—indeed *unconstitutional*—in an opinion that distorts the policy, misunderstands the legal claims asserted, and rewrites well-established precedent. By failing to address head-on the lawfulness of

sex-separated bathrooms in schools, the majority recasts the school policy as classifying students on the basis of transgender status. And based on this recasting, it reaches the remarkable conclusion that schoolchildren have no sex-specific privacy interests when using the bathroom. . . . [T]he logic of this decision would require all schoolchildren to use sex-neutral bathrooms."

The day the opinion issued on August 7, 2020, a judge on the 11th Circuit held the mandate.

The Second Panel Opinion

Nearly nine months later in May 2021, Judge Martin announced she was would retire from the 11th Circuit on September 30, 2021 without taking senior status. The mandate in the *Adams* case still had not issued.

On July 14, 2021, "[i]n an effort to get broader support among our colleagues," Judge Martin wrote that the panel vacated its first opinion and issued a new, narrower opinion. The new panel opinion did not reach the Title IX question and reached only one ground, rather than three, on Adams' Equal Protection claim.

Judge Martin wrote again that the court would affirm the district court, but only "because the School District assigns students to sex-specific bathrooms in an arbitrary manner" by accepting enrollment forms, rather than other legal documents, for self-identification of sex.

The opinion "recognize[d] that the government may promote its interest in protecting privacy by maintaining separate bathrooms for boys and girls, men and women." Nevertheless, the panel found the School Board's policy targeted some transgender students, but not others, and favored outdated government documents over current documents. By refusing to accept current government-issued IDs, the School Board's "irrationality does not survive intermediate review."

Chief Judge William Pryor dissented again, arguing that "[t]he majority tacitly concedes that its [initial] opinion could not withstand scrutiny." He also argued that the School Board's policy was not limited to accepting enrollment papers — a fact not established at trial. He wrote that the School Board's policy was not arbitrary because "[a] student's sex does not come with an expiration date, and it does not require periodic updates to confirm its continuing accuracy."

"The new majority opinion continues its earlier pretense that its reasoning applies only to plaintiff Drew Adams and that it does not decide that sex-separated locker rooms are unconstitutional. But the majority's assurances ring hollow. The logic of this decision, no different from the last opinion the majority issued, would require all schoolchildren to use sex-neutral bathrooms and locker rooms."

Chief Judge William Pryor wrote that the panel's reasoning defied the traditional practice of maintaining separate bathrooms for men and women. "As the late Justice Thurgood Marshall once put it, 'A sign that says 'men only' looks very different on a bathroom door than a courthouse door.'"

* * *

Less than two months later, on August 23, 2021, the full 11th Circuit granted rehearing en banc and vacated Judge Martin's narrower panel opinion. It set oral argument for February 2022, more than four months after Judge Martin was scheduled to leave the Court.

On September 30, 2021, the day Martin retired from the Court, her successor had not been named. The White House did not nominate Judge Martin's replacement, civil rights lawyer Nancy Abudu, until December 23, 2021.

The 11th Circuit heard the *Adams* case en banc on February 22, 2022, with Judge Martin's seat vacant. As of April 18, 2022, the Senate Judiciary Committee had not held a hearing on Abudu's nomination.

Discussion Questions

- Did Judge Martin make a strategic error by withdrawing her first, broader panel opinion and replacing it with a narrow opinion that the full Court still vacated?

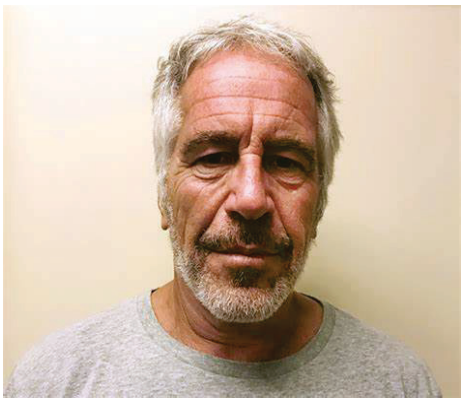
- Judge Martin wrote that she was attempting "to get broader support among [her] colleagues" by issuing a narrower opinion. Whose support was she trying to attract? Did she simply want to shore up support among the Democratic appointees? Or was she hoping to draw support from one of the Trump appointees? If so, from who?

- The White House has been proud of the speed in which it has been nominating judges to the federal bench. But the White House has not been prompt in nominating judges in Florida and waited months to name Judge Martin's replacement. What has been the impact of this delay?

- U.S. District Judge Timothy Corrigan, a conservative judge appointed by President George W. Bush, made a factual finding after three days of trial testimony that Adams is "like any other boy." The dissent was unwilling to give deference to this factual finding. Should it have?

- The Supreme Court in *Bostock* said it was not deciding the issue of transgender use of bathrooms. Did the initial panel opinion properly rely on *Bostock* to hold that Title IX treated transgender discrimination as sex discrimination?

- In her second opinion, Judge Martin stressed that the opinion was narrowly limited to Adams' situation and his use of the bathrooms with private stalls at this one high school. Judge Martin wrote that her opinion did not apply generally to restrooms or to high school locker rooms. "Do not believe it," Judge Pryor responded in dissent, quoting Justice Scalia's dissent in *Lawrence v. Texas*. Should we believe it?



In re Wild
994 F.3d 1244
(en banc)
April 15, 2021

Holding — The Crime Victims' Rights Act, 18 U.S.C. § 3771, does not authorize a crime victim to enforce her statutory victims' rights in a civil action filed before prosecutors bring a criminal case.

Judge Newsom wrote the Court's en banc opinion and a separate concurrence. **Chief Judge William Pryor** and **Senior Judge Gerald Tjoflat** wrote concurrences. **Judges Elizabeth Branch** and **Frank Hull** each wrote dissents.

Court's opinion 7 votes	Concurrences 5 votes	Dissents 4 votes
Newsom (author) William Pryor Wilson Lagoa Brasher Luck* Tjoflat**	(1) William Pryor, with Newsom, Lagoa, Tjoflat (2) Newsom (3) Tjoflat,** joined by William Pryor, Wilson, Newsom, Lagoa	(1) Branch, with Martin, Jill Pryor, Hull** (2) Hull** Recused Jordan Rosenbaum Grant

** Judge Luck declined to join Parts IA (fact section), IVB-3b (prosecutorial discretion argument), and IVD-2 (§3771(c) argument about DOJ's obligations)
** Senior judges Tjoflat and Hull sat en banc as permitted by 28 U.S.C. § 46(c)(1).

Overview

Jeffrey Epstein was a well-connected financier who paid his employees to deliver girls as young as 15 to him to sexually abuse. He sexually abused more than 30 girls, including the petitioner, Courtney Wild.

The Palm Beach Police Department investigated Epstein for more than two years and eventually referred the case to the U.S. Attorney's Office for the Southern District of Florida. By March 2007, federal prosecutors had completed an 82-page prosecution memo and a 53-page draft indictment against Epstein for federal sex crimes.

That same month, federal prosecutors notified some of Epstein's victims of their rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771. Those rights included the "reasonable right to confer with the attorney for the Government in the case" and the "right to be treated with fairness and with respect for the victim's dignity and privacy." § 3771(a)(5), (8).

The statute created other rights related to court proceedings, and imposed obligations on prosecutors. Section 3771(c)(1) states:

> "Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the **detection, investigation, or prosecution of crime** shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." (emphasis added)

The CVRC also provided that a crime victim "may assert the rights" in § 3771(a) and may do so "in the district court in which a defendant is being prosecuted for the crime or, **if no prosecution is underway,** in the district court in the district in which the crime occurred." § 3771(d)(1), (3). "The district court shall take up and decide **any motion** asserting a victim's right forthwith." § 3771(d)(3).

By mid-September 2007, federal prosecutors were negotiating a non-prosecution agreement with Epstein's lawyers. They never conferred with the victims about the agreement. In fact, the agreement provided for keeping its contents secrecy and limiting what prosecutors would tell the victims.

The agreement provided that Epstein would plead guilty in Florida state court to two prostitution offenses in exchange for immunity from federal prosecution.

Months after the parties had signed the non-prosecution agreement (but before it was finalized by senior DOJ officials), prosecutors sent Wild a letter saying Epstein's case was "currently under investigation" and "requested continued

patience" while prosecutors conducted a "thorough investigation." The government told none of the victims about the non-prosecution agreement and only told them that the federal investigation had concluded after Epstein plead guilty to the two state charges in June 2008.

In July 2008, Ms. Wild filed a petition to enforce her rights under the CVRA in federal district court in West Palm Beach, Florida. After more than a decade of litigation, U.S District Judge Kenneth Marra found federal prosecutors had violated her CVRA rights, but failed to order any requested remedies. The district court declined to order relief in part because, while the case was pending, Epstein had committed suicide in a Manhattan jail after being arrested in July 2019 for other federal sex trafficking crimes.

Ms. Wild filed a writ of mandamus, as permitted by the CVRA, with the 11th Circuit. A divided panel denied the writ, holding in an opinion by Judge Kevin Newsom that "the CVA does not apply before the commencement of criminal proceedings." Senior Judge Frank Hull dissented.

The full 11th Circuit agreed to hear the case to answer two questions: **(1)** whether the CVRA creates rights that attach and apply before the formal commencement of criminal proceedings, and **(2)** whether the CVRA creates a private right of action enforceable in a freestanding lawsuit.

Sitting en banc, the Court declined to answer either question, but held instead that the CVRA did not authorize Ms. Wild to file a freestanding civil suit seeking to enforce her CVRA rights in the absence of an underlying criminal case.

Discussion Questions

- All of the dissenting judges were women, and all of the judges in the majority, except for Judge Lagoa, were men. Is this just a coincidence?

- All of the judges in the majority have either worked for a state attorney general as solicitor general or a U.S. Attorney's office as a federal prosecutor. Did this influence the Court's reading of the statute?

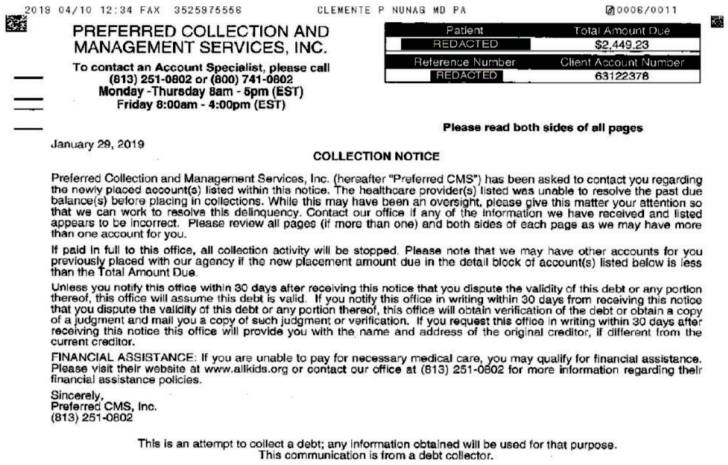
- Is this a case about strict statutory construction or deference to federal prosecutors? How much was the Court's textual reading of the CVRA influenced by concerns with interfering with prosecutorial discretion? Were those concerns justified?

- Judge Newsom puts much weight on the fact that § 1332(d)(3) provides for a victim to file "a motion for relief" in the district court, writing that a motion can only be filed in an existing criminal case. Is that true? The dissent argues that motions,

such as motion to quash grand jury subpoenas or return seized property, are allowed outside cases. Is Wild's petition similar to those motions?

- Section 3771(d)(3) provides that a victim can assert her rights "if no prosecution is underway, in the district court in the district in which the crime occurred." Judge Newsom wrote that this refers to post-prosecution proceeding. Is that reading of the text persuasive?

- Why do you think the Court decided it did not need to decide two questions it presented for en banc review?



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PREFERRED COLLECTION AND MANAGEMENT SERVICES, INC.

To contact an Account Specialist, please call
(813) 251-0802 or (800) 741-0802
Monday -Thursday 8am - 5pm (EST)
Friday 8:00am - 4:00pm (EST)

Patient	Total Amount Due
REDACTED	$2,449.23
Reference Number	Client Account Number
REDACTED	63122378

Please read both sides of all pages

January 29, 2019

COLLECTION NOTICE

Preferred Collection and Management Services, Inc. (hereafter "Preferred CMS") has been asked to contact you regarding the newly placed account(s) listed within this notice. The healthcare provider(s) listed was unable to resolve the past due balance(s) before placing in collections. While this may have been an oversight, please give this matter your attention so that we can work to resolve this delinquency. Contact our office if any of the information we have received and listed appears to be incorrect. Please review all pages (if more than one) and both sides of each page as we may have more than one account for you.

If paid in full to this office, all collection activity will be stopped. Please note that we may have other accounts for you previously placed with our agency if the new placement amount due in the detail block of account(s) listed below is less than the Total Amount Due.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice this office will provide you with the name and address of the original creditor, if different from the current creditor.

FINANCIAL ASSISTANCE: If you are unable to pay for necessary medical care, you may qualify for financial assistance. Please visit their website at www.allkids.org or contact our office at (813) 251-0802 for more information regarding their financial assistance policies.

Sincerely,
Preferred CMS, Inc.
(813) 251-0802

This is an attempt to collect a debt; any information obtained will be used for that purpose.
This communication is from a debt collector.

Hunstein v. Preferred Collection and Management Services, Inc.
17 F.4th 1016
(vacated pending en banc review)
October 28, 2021

Panel Holding —The allegation that a debt collector sent "sensitive medical information" to its mailing vendor, which then sent a dunning letter to the plaintiff, stated a statutory violation with the required "injury in fact" for standing.

Judge Newsom wrote an opinion on rehearing, joined by **Judge Jordan**. **Senior Judge Tjoflat** dissented.

The full Court granted rehearing en banc and heard oral arguments in February.

Overview

Plaintiff Richard Hunstein incurred a debt to Johns Hopkins All Children's Hospital for his son's medical treatment. The hospital assigned the debt to Preferred Collection & Management Services, Inc., which hired Compumail, a commercial mail vendor, to handle the collection. Preferred electronically transmitted to Compumail information about the debt, including Hunstein's name and status as a debtor, the balance of the debt, his son's name, and that the debt concerned his son's medical treatment.

Hunstein sued for violations of the Fair Debt Collection Practices Act, including violations of 15 U.S.C. § 1692(b), which prohibits (with some exceptions) debt collectors from communicating a consumer's personal information to third parties. The district court dismissed the complaint, finding that Preferred's communication with Compumail was not a communication in collection with a debt. A unanimous three-judge panel of the 11th Circuit reversed.

Judge Newsom wrote that the plaintiff had alleged an intangible harm from the statutory violation of § 1692(b). Relying on the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Court found Hunstein's allegation of an intangible harm born "a close relationship to a harm that has traditionally [provided] a basis for a lawsuit in English or American court," namely public disclosure of private facts.

Judge Newsom also found that the "judgement of Congress" favored finding an injury because § 1692(a) identified "invasion of individual privacy" as one of the harms that Congress passed the Fair Debt Collection Practice Act to address.

After the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the panel granted rehearing and issued a new opinion, reaching the same result based on substantially the same reasoning. This time, however, Judge Tjoflat dissented: "I have changed my mind because this Court's standing analysis sweeps much more broadly than *TransUnion* would allow."

Judge Tjoflat wrote that the statutory violation was not *closely related* to the common-law tort of public disclosure of private facts. Rather, the statutory violation was at most met "a third-cousin-twice removed."

He wrote that the tort of public disclosure of private facts requires *publicity* of private information that would be highly offensive to a reasonable person and not of legitimate public interest. In this case, there was no "publicity in the broad, general sense of the word public," only a communication to Preferred's mail vendor. And the communication was not offensive or illegitimate. At common law, "a creditor did not violate a debtor's right to privacy when it informed employers of an employee's debt." Congress' judgment also did not recognize the harm because the statute envisioned the role of intermediaries to collect debts.

Discussion Questions

- Why did Judge Tjoflat change his position?

- *TransUnion* found standing for plaintiffs to sue for intangible statutory violations where TransUnion shared misleading credit reports (identifying the plaintiffs as potential terrorists) with potential creditors. But the Court found no standing for inaccurate files that were not shared, even if a risk of future harm existed. Does *TransUnion* add additional support to Judge Newsom's opinion? Or does it undercut his position?

- In *TransUnion*, Justice Thomas dissented and argued that Congress should be able to create legal rights enforceable based only on a "legal injury," rather than

an injury in fact. Is Judge Newsom's opinion treading close to that position?

- Judge Newsom argues that a statutory violation only needs to be "similar *in kind*," not "similar in *degree*" to the common law tort of public disclosure of private facts for standing. What does that mean? What if the mail vendor had only one employee who learned about Hunstein's debt? What if 100 employees saw a line of information about Hunstein debt, but thought nothing of it?

- Is the alleged violation in these circumstances similar *in kind* to publicity of private fact? Or is there a fundamental difference between broad publicity and the closed communication here between Preferred and its mail vendor?

- How might the Court expand this decision to create standing for violations of pure statutory rights in other contexts like Texas's new abortion law? If a state like Texas followed federal standing jurisprudence (which it apparently does not), would plaintiffs have standing to sue people who violated a state law like Texas' abortion law?

- Will the Supreme Court accept certiorari of this case?